

Internal Revenue Service
memorandum

CC:TL:Blz
DSMorrison

date: AUG 29 1986

to: Assistant District Counsel, Las Vegas CC:REN:LV

from: Director, Tax Litigation Division CC:TL

subject: Policy Statement P-5-60

Your memorandum of May 20, 1986, requested technical advice with respect to the issue stated below.

ISSUE

Whether 100% penalty assessments under I.R.C. § 6672 can be made against certain officers of a corporation without a finding of the requisite legal responsibility and of willfulness.

FACTS

Your office states that Revenue Officers often find it necessary to make "quick assessments" under I.R.C. § 6672 (see IRM 5636.5) against officers of a corporation because of inability to determine which particular persons might be responsible under this section. You also state that these Revenue Officers have asked you to approve or defend the practice of making such assessments without supplying factual bases for a finding of the requisite legal responsibility and willfulness. These Revenue Officers base this practice upon the following paragraph of Policy Statement P-5-60 of the Internal Revenue Manual (IRM):

Determination of responsible officers

When the person responsible for withholding, collecting and paying over taxes cannot otherwise be determined, the Service will look to the President, Secretary, and the Treasurer of the Corporation as responsible officers.

I.R.C. 5632.2 is to the same effect, providing as follows:

If it cannot be conclusively determined which person is responsible, the Service will look to the president, secretary and the treasurer as responsible officers. See Policy Statement P-5-60.

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It is your opinion that the practice described above could not be sustained in any court of law, and that it is not in the best interests of the Service. For the reasons expressed below, this office agrees.

DISCUSSION

The cases under I.R.C. §§ 6671 and 6672 hold that although there must be at least one person who is under a duty to perform the act in question (United States v. Falino, 441 F.2d Supp. 153 (D.C.N.Y. 1977)), the mere holding of corporate office does not ipso facto, or automatically, impose responsibility for the tax. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970); Barrett v. United States, 580 F.2d 449, 217 Ct. Cl. 617 (1978); Campbell v. Nixon, 207 F. Supp. 826 (E.D. Mich. 1962) and cases cited. As stated in Wiggins v. United States, 188 F. Supp. 374, 376 (E.D. Tenn. 1960), "(t)he statute is directed at the person charged with the duty of collecting and paying he taxes and not simply one who may have authority to do so".

Consistently with the foregoing, § 721 of IRM 57(16)0 states:

Regardless of his/her title in the corporation or amount of stock owned, an individual will not be held liable for the one hundred percent penalty unless he/she has the duty to perform or the power to direct the act of collecting, accounting for, and paying over these trust fund monies...

In view of the foregoing, the provisions of Policy Statement P-5-60, and of IRM § 5632.1, which state that the Service will "look to" the President, Secretary and Treasurer where the responsible officer cannot be "conclusively" or "otherwise" determined, should not be interpreted as meaning that assessments against such officers can be made or supported without the findings of legal responsibility and willfulness which are generally required by I.R.C. §§ 6671 and 6672, and the court holdings thereunder. A contrary interpretation might well subject the Government to liability for attorneys fees under 28 USC § 2412(d). See United States v. Estridge, _____ F.2d _____, 57 AFTR 2d 86-1006 (8th Cir. 1986).

CONCLUSION

I.R.C. §§ 6671 and 6672 impose the same requirements as to the existence of a duty to collect, etc., the tax, and as to willful failure, on corporate officers as on other persons described in those sections. Furthermore, the court decisions under these sections are to the effect that the mere holding of corporate office does not ipso facto impose responsibility. However, in accordance with IRM 5636.5 it may sometimes be necessary to make quick assessments against corporate officers under I.R.C. § 6672 without full development of the facts, in order to prevent the statute of limitations from expiring. If the facts can thereafter be developed which support the assessment or assessments against the particular officers(s) in question then such assessments should be defended. Otherwise, they should be abated well prior to litigation, in order to avoid possible liability for attorneys fees.

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By:



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